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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

JAN E. KRUSKA, Plaintiff, v. PERVERTED JUSTICE FOUNDATION INCORPORATED, et. al., Defendants.	No. CV 08-0054-PHX-SMM **ORDER**

Before the Court is Defendant David Butler's Second Motion to Dismiss (Doc. 64) for failure to state a claim upon which relief can be granted (Doc. 1). Also pending before the Court is Butler's First Motion to Dismiss for Lack of Jurisdiction (Doc. 81) and Plaintiff's Request for Sanctions (Doc. 90).

BACKGROUND

A. Factual Background

In her Complaint, Plaintiff alleges that "David Butler is the President of Filmax Inc. a Tennessee based [c]orporation. Since Filmax Inc. is listed as the domain holder for www.jankruska.com and www.jankruska.net, Filmax Inc. is open to liability in this cause of action." (Doc. 1, ¶ 45) Additionally, Plaintiff claims that she contacted April and David Butler and Filmax and requested that they cease and desist (Id. ¶ 46). David Butler allegedly responded via email and stated that he "fully supported what April Butler was

doing." (Id.) Plaintiff seeks relief against David Butler based on six counts: (1) intentional infliction of emotional distress; (2) defamation; (3) the Racketeer Influenced and Corrupt Organizations statutes (18 U.S.C. § 1961-1968) ("RICO"); (4) violations of federal cyberstalking and cyberharrassment law (18 U.S.C. § 2261A); (5) infringement of copyright under the Digital Millennium Copyright Act ("DMCA"); and (6) common law negligence (Id. ¶¶ 78-111).

B. Procedural History

On February 29, 2008, David Butler filed a Motion to Dismiss based upon failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) (Doc. 23). The Court subsequently denied the Motion to Dismiss without prejudice because David Butler failed to cite any authority to support his statements in opposition to the claims set forth in Plaintiff's Complaint (Doc. 62). David Butler filed his Second Motion to Dismiss under Rule 12(b)(6) on June 19, 2008 (Doc. 64).

STANDARD OF REVIEW

A complaint may be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). When deciding a Motion to Dismiss, all allegations of material fact in the complaint are taken as true and construed in the light most favorable to the plaintiff. W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

A court may dismiss a claim either because it lacks "a cognizable legal theory" or because it fails to allege sufficient facts to support a cognizable legal claim. SmileCare Dental Group v. Delta Dental Plan of Cal., Inc., 88 F.3d 780, 783 (9th Cir. 1996). "Dismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment." Polich v. Burlington N., Inc., 942 F.2d 1467, 1472 (9th Cir.1991). When exercising its discretion to deny leave to amend, "a court must be guided by the underlying purpose of Rule 15 to facilitate

decisions on the merits, rather than on the pleadings or technicalities." United States v. Webb, 655 F.2d 977, 979 (9th Cir. 1981).

DISCUSSION

I. Butler's Second Motion to Dismiss

A. Intentional Infliction of Emotional Distress

In Arizona, three elements are necessary to establish a claim for intentional infliction of emotional distress: "*[F]irst*, the conduct by the defendant must be 'extreme and outrageous'; *second*, the defendant must either intend to cause emotional distress or recklessly disregard the near certainty that such distress will result from his conduct; and *third*, severe emotional distress must indeed occur as a result of defendant's conduct." Citizen Publishing Co. v. Miller, 115 P.3d 107, 110 (Ariz. 2005) (en banc) (quoting Ford v. Revlon, Inc., 153 Ariz. 38, 43 (1987)). A plaintiff must demonstrate that the defendant's acts were "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." Mintz v. Bell Atlantic Systems Leasing Intern., Inc., 905 P.2d 559, 563 (Ariz. Ct. App. 1995) (quoting Cliff v. Farmers Ins. Exch., 10 Ariz. App. 560, 562 (1969)). Indeed, even unjustifiable conduct does not rise to the level necessary of "atrocious" and "beyond all possible bounds of decency" to establish an intentional infliction of emotional distress claim. Nelson v. Phoenix Resort Corp., 888 P.2d 1375, 1386 (Ariz. Ct. App. 1994). This standard distinguishes "true claims from false ones, and . . . the trifling insult or annoyance from the serious wrong." Godbehere v. Phoenix Newspapers, Inc., 783 P.2d 781, 785 (Ariz. 1989) (quotation omitted).

In the matter presently before the Court, Plaintiff's Complaint fails to allege sufficient facts to support a cognizable legal theory for a claim against David Butler for intentional infliction of emotional distress. Plaintiff's Complaint is predicated upon allegations that defendants April Butler and Filmax are listed as the domain name holders and responsible parties for www.jankruska.com and www.jankruska.net. Plaintiff does not set forth facts to support the existence of any "extreme and outrageous" conduct by

David Butler, except for an email stating that "he fully supported what April Butler was doing." There are no allegations of any alleged ownership, use or connection between David Butler and the websites, other than his position as president of the company that allegedly owned the websites. Consequently, Plaintiff's claim of intentional infliction of emotional distress will be dismissed without prejudice.

B. Defamation

A claim for defamation in Arizona involving a non-public figure requires the following: (1) a false statement concerning the plaintiff; (2) the statement was defamatory; (3) the publication of the statement to a third party; and (4) the plaintiff was damaged as a result of the statement. Morris v. Warner, 770 P.2d 359, 366 (Ariz. Ct. App. 1988). For a defamation claim to succeed, the one who publishes the defamatory communication must know that the statement is false and defamatory, act in reckless disregard, or act negligently. Dube v. Likins, 167 P.3d 93, 104 (Ariz. Ct. App. 2007).

For this count to succeed, David Butler would have to be directly liable as the declarant of the damaging statements or vicariously liable as the publisher or distributor of those statements. Plaintiff does not allege that any of the offending statements were created or developed by David Butler. Neither is there any claim by Plaintiff that David Butler personally published or distributed the supposedly defamatory statements. Rather, the websites on which the statements appeared were owned by April Butler and Filmax, not David Butler. As a result, Plaintiff's defamation claim is dismissed without prejudice.

C. RICO

The Racketeer Influenced and Corrupt Practices Act ("RICO") provides for a private right of recovery if a defendant is found to be in violation of the statute. "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . ." 18 U.S.C. § 1964(c).

In order to recovery under RICO, several elements must be established, including "(1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an 'enterprise' (7) the activities of which affect interstate or foreign commerce." Moss v. Morgan Stanley, Inc., 719 F.2d 5, 17 (2d Cir. 1983). Racketeering activity is further defined as "any act or threat involving . . . extortion" and "interfer[ing] with commerce, robbery or extortion." 18 U.S.C. § 1961(1)(A), (B). The Ninth Circuit has held "[t]he key task [in RICO claims] is to determine whether this injury was by reason of the [defendant's] alleged violations . . ." Mendoza v. Zirkle Fruit Co., 301 F.3d 1163, 1168 (9th Cir. 2002). This ". . . requirement the Supreme Court has interpreted to encompass proximate as well as factual causation." Id.

The acts allegedly constituting the RICO violation are laid out in Plaintiff's Complaint.

> i. Sending mass e-mails, creating multiple webpages, blog pages, and internet bulletins accusing Plaintiff, among other things as being a 'child Molester' and 'pedophile'
> ii. Encouraging and directing their associates and the general public to post and repost said information, encouraging their associates and the general public to undertake other criminal acts against Plaintiff including e-mails to harass, trespassing, criminal damage to property and bodily harm to Plaintiff, etc.
> iii. Encouraging and directing their associates, individuals, and the general public to contact and threaten business entities with which the Plaintiff has ties.

(Doc. 1, ¶ 93). Plaintiff does not cite which definition of "racketeering activity," as defined under 18 U.S.C. § 1961(1) David Butler allegedly committed. Broadly stated, Plaintiff's RICO allegations are to encompass "any act or threat involving . . . extortion" under 1961(1)(A) or "interfer[ing] with commerce, robbery, or extortion" under § 1961(1)(B). For this claim, the Court's task is to determine whether the alleged injury was caused by David Butler. Plaintiff makes no assertion that David Butler created or disseminated any of the allegedly harmful statements. Indeed, with regard to each of the allegedly defamatory statements, there is no allegation that David Butler took any action, other than responding via email that he "supported what April Butler was doing." The

"racketeering activity" listed in RICO requires some affirmative act ("any act or threat" and "interference"). As such, David Butler could not be the actual or proximate cause of any harm Plaintiff suffered as a result of these "encouragements" or the allegedly defamatory statements. Therefore, this claim is dismissed without prejudice.

D. Cyberstalking and Cyberharrassment

18 U.S.C. § 2261A governs a federal cyberstalking or cyberharrassment claim. Punishment for violations of this act is covered by 18 U.S.C. § 2261 and includes fine or imprisonment. See 18 U.S.C. § 2261(b). The act creates no private right of recovery. See 18 U.S.C. § 2261A.

As these allegations are defined in the federal criminal code, and the statute provides no private right of action for a violation, Plaintiff's claim under this statute is dismissed with prejudice.

E. Digital Millennium Copyright Act (DCMA)

"Plaintiffs must satisfy two requirements to present a prima facie case of direct infringement: (1) they must show ownership of the allegedly infringing material and (2) they must demonstrate that the alleged infringers violate at least one exclusive right granted to copyright holders under 17 U.S.C. 106." A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1013 (9th Cir. 2001).

The Ninth Circuit has held that a defendant is a contributory infringer if he (1) has knowledge of another's infringement and (2) either (a) materially contributes to or (b) induces that infringement. See Perfect 10, Inc. v. Visa Intern. Service Ass'n, 494 F.3d 788, 795 (9th Cir. 2007) (contributory infringement found when defendant "(1) has knowledge of a third party's infringing activity, and (2) induces, causes, or materially contributes to the infringing conduct"); A&M Records, 239 F.3d at 1019 (9th Cir. 2001) (contributory infringement found in Internet cases when the defendant "engages in personal conduct that encourages or assists the infringement"); Metro-Goldwyn-Mayer Studios v. Grokster, Ltd., 545 U.S. 913, 930 (2005) ("one infringes contributorily by intentionally inducing or encouraging direct inducement"); Perfect 10, Inc., v.

Amazon.com, Inc., 487 F.3d 701, 727 (9th Cir. 2007) (contributory infringement found where an actor "knowingly tak[ing] steps that are substantially certain to result in such direct infringement").

Plaintiff has alleged copyright infringement occurred when copyrighted pictures of her were posted on www.jankruska.com and www.jankruska.net along with excerpts of articles she had written. There is no allegation that David Butler committed a direct violation of any copyright by posting any allegedly copyrighted photos or articles on the websites www.jankruska.com and www.jankruska.net. Rather, Plaintiff appears to allege that David Butler is secondarily liable for contributory copyright infringement through being president of the company owning the website where April Butler posted copyrighted material. David Butler may have had knowledge of April Butler's infringement of Plaintiff's copyrights as evidenced by his email indicating his "support" of her activities. However, there is no claim that David Butler materially contributed or induced April Butler's infringement. Therefore, this claim is dismissed without prejudice.

F. Prima Facie Tort[1]

Negligence is defined as "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm." Res. 2d Torts 282. To prevail on a cause of action for negligence, a plaintiff must establish that the defendant owed a duty to the plaintiff, the defendant breached that duty, causation, and actual damages. See Vivian Arnold Realty Co. v. McCormick, 506 P.2d 1074, 1079 (Ariz. Ct. App. 1973); Berne v. Greyhound Parks of Arizona, Inc., 448 P.2d 388 (Ariz. 1968). A negligence claim may only be maintained if there is a legally recognized duty requiring the defendant to conform to a particular standard of conduct in order to protect others from unreasonable risks of harm. Ontiveros v. Borak, 667 P.2d 200 (Ariz. 1983). In her Complaint, Plaintiff specifies no duty owed by David Butler under Arizona law, or any of

[1]The Court interprets this claim to mean common law negligence.

the other elements necessary for a negligence claim. Thus, the motion to dismiss as to the negligence claim will be granted without prejudice.

II. Butler's First Motion to Dismiss for Lack of Jurisdiction

On February, 29, 2008, Butler filed a Motion to Dismiss based upon failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) (Doc. 23). The Court subsequently denied this Motion to Dismiss without prejudice because Butler failed to cite to any authority to support his statements in opposition to the claims set forth in Plaintiff's Complaint (Doc. 62).

Following the Court's Order, Butler filed a Second Motion to Dismiss under Rule 12(b)(6) on June 19, 2008 (Doc. 64). This Second Motion to Dismiss is discussed above. Approximately one month later, on July 8, 2008, he filed his First Motion to Dismiss for Lack of Jurisdiction in which he argues that the Court should dismiss Plaintiff's Complaint for lack of personal jurisdiction (Doc. 81). As the Court grants the Second Motion to Dismiss under Rule 12(b)(6), Butler's First Motion to Dismiss for Lack of Jurisdiction will be denied as moot.

III. Plaintiff's Request for Sanctions

Plaintiff filed a Motion for Sanctions arising from Defendant's filing of his First Motion to Dismiss for Lack of Jurisdiction (Doc. 90). Plaintiff requests sanctions against Defense counsel under Federal Rule of Civil Procedure Rule 11 for "filing an untimely and frivolous Motion." Since the First Motion to Dismiss for Lack of Jurisdiction allegedly was not warranted under Federal Rule 12, Plaintiff seeks "reasonable expenses, including fees incurred by Plaintiff in responding to Defendant's Motion dated July 8, 2008."

In discussing situations in which sanctions are appropriate, Rule 11(b) states the following:

> By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--*an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances*:

> **(1)** it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> **(2)** the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
>
> **(3)** the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> **(4)** the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Fed. R. Civ. P. 11(b) (emphasis added). It appears that Butler's First Motion to Dismiss for Lack of Jurisdiction was filed based upon defense counsel's best knowledge, information, and belief, formed after an reasonable inquiry. Furthermore, the arguments contained therein were not presented to the Court for an improper purpose and were not frivolous. As the party who initiated the lawsuit, Plaintiff must bear the cost of filing and defending motions in this case. As a result, no award of sanctions is appropriate.

Accordingly, for the reasons given above,

IT IS HEREBY ORDERED GRANTING Butler's Second Motion to Dismiss (Doc. 64).

IT IS FURTHER ORDERED DISMISSING without prejudice Count III (intentional infliction of emotional distress) against Defendant David Butler (Doc. 1).

IT IS FURTHER ORDERED DISMISSING without prejudice Count IV (defamation) against Defendant David Butler (Doc. 1).

IT IS FURTHER ORDERED DISMISSING without prejudice Count V (RICO) against Defendant David Butler (Doc. 1).

IT IS FURTHER ORDERED DISMISSING with prejudice Count VI[2] (cyberharassment) against Defendant David Butler (Doc. 1).

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[2]This ruling references the first count labeled VI in Plaintiff's Complaint (Doc. 1).

IT IS FURTHER ORDERED DISMISSING without prejudice Count VI[3] (DMCA violations) against Defendant David Butler (Doc. 1).

IT IS FURTHER ORDERED DISMISSING without prejudice Count VII (common law negligence) against Defendant David Butler (Doc. 1).

IT IS FURTHER ORDERED DENYING Butler's First Motion to Dismiss for Lack of Jurisdiction as **MOOT** (Doc. 81).

IT IS FURTHER ORDERED DENYING Plaintiff's Request for Sanctions (Doc. 90).

DATED this 5th day of February, 2009.

Stephen M. McNamee
United States District Judge

[3]This ruling references the second count labeled VI in Plaintiff's Complaint (Doc. 1).